RE: RULE 3-120 (SEXUAL RELATIONS W/CLIENT)
12/10/04 Commission Meeting
Open Session Item III.F.

DATE: November 24, 2004

TO: Commission Members

FROM: IJRuvolo

RE: Rule 3-120 Sexual Relations With Clients

On September 20, 2004, I wrote to commission members and recommended that we retain the current version of Rule 3-120, and not adopt the ABA Model Rule 1.8(j) approach banning *all* sexual relations between lawyers and clients which commence post-engagement. I have now received a copy of a letter from COPRAC addressed to Harry and the commission dated August 24, 2004, requesting that we adopt the ABA version. I have been asked to respond to this letter, which is the purpose of this memorandum. I remain unconvinced that California should adopt the ABA version for the reasons contained in my previous memo, and as further appears below.

As I noted in my earlier memo, the ABA approach is to ban completely the formation of a sexual relationship between an attorney and a client during the attorney-client relationship. An exception is that a pre-existing relationship may continue so long as the attorney's representation is not "materially limited" by the relationship. California's approach is to limit sexual relations only where (1) the relationship is a quid pro quo for the attorney-client relationship commencing or continuing, (2) the attorney uses undue influence in establishing the relationship, or (3) the quality of the attorney's services is impaired because of the relationship.

COPRAC advances several arguments in support of its view, including that a complete ban will make it "easier" for the State Bar to enforce the rule. I addressed this issue in my earlier memo in response to a similar comment made by the OCTC. As I noted then, "I have little tactical concern for how relatively easy or hard a rule makes either the prosecution or defense of a disciplinary proceeding, unless the substantive protection afforded by a rule to the public, the legal profession, or to the integrity of the judicial system is being eroded thereby. I hope I have made this point already during our discussions of other rules."

"With that in mind, no one has made a case, of which I am presently aware, that the existing rule is not working in the sense that clients are complaining about sexual relationships with their lawyers which do not fall into one of the categories prohibited by our existing rule. Therefore, there is no further protection the public needs by expanding the rule."

Indeed, neither does COPRAC make such a case. It suggests in a most conclusory manner, and without any pretense of offering empirical support, that the incidence of violations of Rule 3-120 is "underreported." Even the OCTC which laments that our rule is more difficult to enforce than a complete ABA-type ban, does not suggest that violations of our rule are "underreported."

While it may be harder to prove a violation because 3-120 requires the State Bar to prove *both* the existence of a relationship and either an abuse of, or a pernicious effect on, the professional relationship caused by the sexual relations, what is wrong with that? After all, is not the purpose of the rules the regulation of conduct of individuals *as lawyers*? Surely, outside the context of having a deleterious effect on a lawyer/client relationship, the social habits of lawyers which do not reach the level of moral turpitude should not be the subject of disciplinary action by the State Bar. Concern properly arises where such a relationship occurs under circumstances where the professional relationship is compromised. This problem is addressed by the current rule.

The same can be said of COPRAC's unsupported claim that making it easier to prove a violation would also have a salutary effect by inhibiting attorneys from entering into such relations. Apparently, the thinking is that making enforcement incrementally more difficult encourages lawyers to have sexual relations with clients. But, unnecessarily inhibiting lawyers and clients from exercising the right to choose their personal and sexual partners is not a good thing. As I said in my earlier memo: "[T]here is more than a trivial public interest furthered in not over-regulating consenting sexual relationships between attorneys and clients. We should not lose sight of the fact that for every non-coerced sexual relationship that does not produce a deleterious effect on the attorney's representation, a client is making a choice that presumably is enhancing his or her life. In many cases it may turn out that the personal relationship that develops ultimately between client and attorney transcends in importance the professional relationship. To the extent clients benefit from having the freedom to choose to engage in a sexual relationship with an attorney that does not result in actual harm to their legal matter, we are doing the right thing in not adopting a bright line ban as per the ABA Model Rule."

Continuing on, COPRAC concludes that a total ban on post-engagement sexual relations "is not too much to ask" of lawyers, further pointing out that the impact of such a ban is blunted by the exception in Rule 1.8(j) for pre-engagement relationships. In light of my earlier comments about the potential value interpersonal relations may have for both the attorney and the client, I presume it is COPRAC's view that adopting Model Rule 1.8(j) is not too much to ask of *both* the lawyer *and* the client. As already discussed, I disagree.

This issue brings to mind an additional problem not addressed in my earlier memo--that is, Model Rule 1.8(j) implicates both the federal and California constitutional rights of sexual privacy. It has long been settled that there is a federal and state constitutional right to sexual privacy. In fact, this penumbra right is one of individual autonomy thereby requiring the existence of a compelling state interest before it can be abridged. (*Griswold v. Connecticut* (1965) 381 U.S. 479) One prong of the "compelling state interest test" is whether the law is narrowly tailored to meet the needs of the public. The U.S. Supreme Court has recently affirmed this tenet of constitutional law, in striking down Texas' sodomy law. (*Lawrence v. Texas* (2003) 539 U.S. 558) Our state supreme court follows this same analytical path when scrutinizing laws affecting sexual privacy under the California constitution. (*American Academy of Pediatrics v. Lungren* (1997) 15 Cal.4th 307)[1]

It is questionable whether a total ban on sexual relations would meet this constitutional test. While the desire to make disciplinary prosecutions easier may satisfy the less stringent rationale basis test, because the constitutional right involved here is one of personal autonomy, that test is not applicable. I have been unable to find any cases under Model Rule 1.8(j) discussing that rule's constitutionality, although recent commentary suggests 1.8(j) is constitutionally infirm. (*Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex,* Mischler, Geo. J. Legal Ethics (Winter 1997)) I would expect that if California were to adopt 1.8(j) here, the first attempt to discipline a member of the State Bar for having an otherwise "innocent" sexual relationship with a client, would be met with just such a challenge. It remains to be seen whether the ABA rule can be defended under the strict scrutiny test.

Additionally, I am concerned that merely banning sexual relations without requiring some nexus to a lawyer's professional duties would encourage unrequited lovers to use the existence of a sexual relationship with a lawyer as a bludgeon against the attorney-paramour for some perceived personal slight or offense. Surely, we do not want the State Bar disciplinary system to be used as a dispensary for heart balm, or a venue in which jealous romantic partners seek vengence. Neither COPRAC nor the OCTC addresses this potential problem.

[1] From a constitutional prospective, the Model Rule is also hopelessly vague. Unlike our rule, the ABA does not define "sexual relations." I suppose this problem is not insurmountable inasmuch as we could import our definition if the will of the commission is to adopt the ABA approach.

Lastly, the COPRAC letter ends with approving references to ABA commentary developed during the discussion concerning 1.8(j). Comments such as "the attorney-client relationship is almost always unequal," and that "it is unlikely a client can provide informed consent due to the 'client's own emotional involvement,'" are hyperbolic, overly simplistic conclusions offered to explain complex social interactions, and, frankly they also strike me as being unduly paternalistic. To the extent these conditions exist in a given relationship resulting from the use of coercion, quid pro quo demands, or causing harm to the attorney client relationship, current Rule 3-120 bans the conduct. There is simply no need to adopt ABA Model Rule 1.8(j).

M E M O R A N D U M

DATE: September 20, 2004

TO: Commission Members

FROM: IJRuvolo

RE: Rule 3-120 Sexual Relations With Clients

For the following reasons, I do not recommend that we adopt the ABA Model Rule version of this rule (1.8(j)), nor do I perceive the need to recommend any changes to our existing rule.

The ABA approach is to ban completely the formation of a sexual relationship between an attorney and a client during the attorney-client relationship. An exception is that a pre-existing relationship may continue so long as the attorney's representation is not "materially limited" by the relationship.

California's approach is to limit sexual relationships only where (1) the relationship is a quid pro quo for the attorney-client relationship commencing or continuing, (2) the attorney uses undue influence in establishing the relationship, or (3) the quality of the attorney's services is impaired because of the relationship. Thus, our existing rule reflects a view that the state bar should regulate interpersonal relationships of its members only where there is a demonstrated evil resulting from it. This attitude doubtlessly stems from the conclusion that any "appearance" problem is outweighed by an unwillingness to interfere with member rights of personal autonomy by imposing a bright line rule.

Firstly, I agree with California's more prophylactic approach to this issue. I remember the debates when the idea of this rule was first broached. The issue came up as one most problematic to the family law bar, however, no one was willing to limit its application to that specialty (with good reasons, in my judgment). Also, a majority wanted the State Bar to respect the personal choices of consenting adults in such matters unless there was a real, and not just hypothetical, problem attendant to the relationship. The more pursuasive position then was that the State Bar should not get involved in more regulation than necessary to protect the public.

The OCTC apparently would like us to adopt something more akin to the ABA ban to the formation of sexual relationships. Mr. Nisperos' memorandum suggests that the current rule "does not work" because it makes the job of OCTC harder in that it must prove *both* the existence of a relationship and a pernicious effect on the professional relationship caused by the sexual relationship. Thus, I presume his complaint is chiefly directed at subdivision (B)(3) of the rule. He also falls back on the "appearance" problem.

I have already commented on the latter point Mr. Nisteros makes. As to the former point, I have little tactical concern for how relatively easy or hard a rule makes either the prosecution or defense of a disciplinary proceeding, unless the substantive protection afforded by a rule to the public, the legal profession, or to the integrity of the judicial system is being eroded thereby. I hope I have made this point already during our discussions of other rules.

With that in mind, no one has made a case, of which I am presently aware, that the existing rule is not working in the sense that clients are complaining about sexual relationships with their lawyers which do not fall into one of the categories prohibited by our existing rule. Therefore, there is no further protection the public needs by expanding the rule. On the other hand, there is more than a trivial public interest furthered in not over-regulating consenting sexual relationships between attorneys and clients. We should not lose sight of the fact that for every non-coerced sexual relationship that does not produce a deliterious effect on the attorney's representation, a client is making a choice that presumably is enhancing his or her life. In many cases it may turn out that the personal relationship that develops ultimately between client and attorney transcends in importance the professional relationship. To the extent clients benefit from having the freedom to choose to engage in a sexual relationship with an attorney that does not result in actual harm to their legal matter, we are doing the right thing in not adopting a bright line ban as per the ABA Model Rule.

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2161

August 24, 2004

Commission for the Revision of the Rules of Professional Conduct
State Bar of California
Attn: Audrey Hollins, Professional Competence Unit
180 Howard Street
San Francisco, California, 94105-1639

Re: Proposed Revision of Rule 3-120

Dear Chairman Sondheim and Members of the Rule Revision Commission,

The Committee on Professional Responsibility and Conduct (COPRAC) commends the continuing work of the Rule Revision Commission and takes this opportunity to urge the Commission to revise Rule 3-120 to conform with recently adopted ABA Model Rule 1.8(j). This amendment would ban sexual relations between an attorney and his or her current client unless the attorney and client had consensual sexual relationship pre-dating the attorney-client relationship. This would bring the ethical constraints on California attorneys more in line with the standard of conduct already imposed on other California professionals such as physicians, psychotherapists and drug counselors. (Bus. & Prof. Code § 729(a).)

While California was a leader in adopting Rule 3-120, the ABA has led the way in adopting a broader ban on sex with clients that will be easier to enforce and, hence, will be more likely to deter sexual relationships that can adversely affect clients, particularly those in an emotionally vulnerable state.

Sexual relationships with clients first caused concern in the context of divorce cases, prompting the American Academy of Matrimonial Lawyers to prohibit an attorney from commencing a sexual relationship with a client while representing the client in a matrimonial matter. The New York Court of Appeals adopted the same prohibition for family law practitioners. When the California Supreme Court adopted Rule 3-120 in 1995, California was a leader in creating a disciplinable offense for sexual relations with clients regardless of the lawyer's field of practice.

Even while extending the reach of the rule to all lawyers, however, California pared back the rule's scope out of concern about impinging on freedom of association. Hence, the rule did not ban sexual relationships outright, but only where the sexual relationship caused the attorney to fail to meet his or her professional obligation to perform legal services competently or when coercion or undue influence can be established. We are concerned that these qualifications make the rule so difficult to enforce that it has little deterrent effect. A more bright-line rule that is easier to enforce should have a stronger deterrent effect. We agree with the Orange County Bar Association that the

present limited provisions of the current rule are insufficient to protect clients from the potential harm of such conduct. See formal opinion 2003-02 of the Orange County Bar Association, a copy of which is enclosed.

We understand that there will be concern about overbreadth. This is particularly true in California, which has to a lesser extent than some other jurisdictions, and the ABA, enacted absolute prohibitions on certain engagements. Compare ABA Model Rule 1.8(d) (lawyer may not, before end of representation, obtain media or literary rights to portrayal of representation) with Maxwell v. Superior Court (1982) 30 Cal.3d 606 (permitting such an agreement, with client consent.) We believe there are several answers to this concern.

First, the Committee believes that problems with attorneys improperly crossing professional boundaries by having sex with clients are underreported. Some attorneys - we would hope a very small minority of our profession - have taken advantage of clients in a vulnerable position, on occasion misusing the attorney's perceived position of authority over the client. Many clients who are the subject of this conduct will simply not speak out, due to the stigma and personal dynamics involved, not to mention the highly personal nature of the conduct at issue. Onerous proof requirements such as in the present Rule 3-120 further deter reporting, in our opinion.

Second, we believe it is not too much to ask for a lawyer to forebear from sexual relationships with current clients with whom the lawyer did not have a sexual relationship at the outset of the representation. Under new ABA Model Rule 1.8(j), a lawyer may enter into a sexual relationship with a client after the attorney-client relationship is terminated or, in a firm, if the matter is re-assigned to another attorney. This is less strict than the prohibitions on many other professionals, which extend beyond the termination of the professional relationship. The fact that there is no prohibition on sex with a former client limits the impairment of freedom of association and closely ties the prohibition to a legitimate area of regulatory concern: the attorney-client relationship.

Third, neither current Rule 3-120(D) nor current ABA Model Rule 1.8(j) has an imputation component - that is, the absolute ban applies only to the particular lawyer engaged in sexual relations with the client. This lack of imputation further limits the rule by limiting disqualification of an entire firm in the event a relationship develops between a lawyer and a client.

As the ABA Ethics 2000 Commission stated in its August 2001 Report to the ABA House of Delegates: "Although recognizing that most egregious behavior of lawyers can be addressed through other Rules . . . having a specific Rule has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients but also of alerting clients that the lawyer may have violated ethical obligations in engaging in such conduct." The Comment to Rule 1.8(j) points out that the "attorney-client relationship is almost always unequal" and a sexual relationship between attorney and client thus places at risk the lawyer's "basic obligation not to use the trust of the client to the client's disadvantage." ABA Model Rule 1.8(j), comment [17]. Consistent with California Rule 3-120, the ABA commentary further points out that it is unlikely a client can provide informed consent due to the "client's own emotional involvement." ABA Model Rule 1.8(j), comment [17].

For the above reasons, COPRAC urges the Commission to propose a new Rule 3-120 identical to that of ABA Model Rule 1.8(j).

Sincerely,

/ s /

Sean M. SeLegue, Chair
State Bar of California
Committee on Professional
Responsibility and Conduct

copy: Committee on Professional Responsibility and Conduct
Mark Taxy, Esq. (Staff Counsel)

Excerpt from September 27, 2001 Memorandum

DATE: **September 27, 2001**

TO: **The Commission for the Revision of the Rules of Professional Conduct**

FROM: **Mike Nisperos, Jr., Chief Trial Counsel**

SUBJECT: **Recommendations for Changes to the Rules of Professional Conduct**

15. **Rule 3-120. Sexual Relations With Clients**

OCTC's recommends simplifying the rule regarding sexual relations with a client to prohibit sexual relations with a client unless they predate the commencement of the lawyer-client relationship or occur after the lawyer-client relationship has ended.

Remove:

. . .

~~(B) A member shall not:~~
~~(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or~~
~~(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or~~
~~(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.~~

~~(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer client relationship.~~

~~(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.~~

And replace with:

(B) A member shall not have sexual relations with a client unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced.

(C) While lawyers are associated in a firm, this prohibition applies to any one of them, regardless of whether or not they are working on the case for the relevant client.

Discussion:

. . .

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Because of the significant danger of harm to the client's interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client or harm to the client's case.

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.

When the client is an organization, this Rule prohibits a lawyer for the organization (whether inside or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with the lawyer concerning the organization's legal matters, unless the relationship existed before the commencement of the lawyer-client relationship.

OCTC COMMENTS:

OCTC believes that the current rule regarding sexual relations with a client does not work. It requires the State Bar to prove both the sexual relationship and that it caused the lawyer to act incompetently or that coercion or undue influence was used. Yet, such a relationship appears to create conflicts and a host of problems. These issues are best resolved, as the ABA does in proposed Model Rule 1.8(j) by prohibiting all sexual relationships with a client, unless they predate the commencement of the attorney-client relationship.